

with the absentee voting laws of Maine: application for absentee or physical incapacity ballot not signed by the voter; application for physical incapacity ballot not certified by physician; envelope not notarized; no signature of voter on envelope; jurat not in form as prescribed by statute; name of voter and official giving the oath are the same; variance in writing between signature on application and signature on envelope; failure of voter to specify on envelope his reason for absentee voting; and voter not properly registered or qualified to vote.

The committee concluded that there were 109 instances where the voter failed to substantially comply with the election laws, leading to rejection of the ballots as compliance was mandatory.

§ 12.8 Where state law required alternation of names of all candidates on ballots so that each name appeared an equal number of times at the beginning, end, and at intermediate places thereon, failure to comply with the requirement did not result in overturning the election.

In the 1951 Ohio contested election case of *Huber v Ayres* (§ 56.1, *infra*), a newly adopted state constitutional provision required alternation of the candidates' names an equal number of times in various positions on the ballot. However, the majority recommended, and the House agreed to, a resolution dismissing the contest on the basis that the remedy under state law had not been exhausted.

D. DEFENSES

§ 13. Generally

Under the new Federal Contested Elections Act (2 USC §§ 381–396), the contestee may, prior to answering the contestant's notice of contest, make the following defenses by motion served on the contestant and such motions may form the basis of a motion to dismiss made before the Committee on House Administra-

tion: insufficiency of service of notice of contest; lack of standing of the contestant; failure of the notice of contest to state grounds sufficient to change the result of the election; and failure of the contestant to claim right to the contestee's seat [see 2 USC § 383(b)]. These statutory defenses are supplemental to those described in the precedents below.

Permissible Defenses to Election Contests

§ 13.1 Among the defenses which may be raised as grounds for dismissing an election contest are that contestant has failed to make out a prima facie case, did not file the contest in good faith, has failed to exhaust available legal remedies at the state level, or that contestant was not a proper party

In *McEvoy v Peterson* (§52.2, *infra*), a 1944 Georgia contest, the House dismissed an election contest as recommended by the unanimous committee report, where it appeared that contestant's name had not appeared on any ballots and he had not received any votes, that contestant had failed to exhaust available legal remedies, had not filed the election contest in good faith, and had failed to make out a prima facie case.

Candidate's Participation in irregularities

§ 13.2 The mere existence of an irregularity in any campaign should not be attributed to a particular candidate where he did not participate in such irregularity.

In the 1959 Arkansas investigation of the right of Dale Alford to a seat in the House (§58.1, *infra*), the election committee condemned the use of an unsigned pre-election circular by an individual who had distributed information in Mr. Alford's behalf, apparently without the candidate's knowledge. The committee ruled, however, that the mere existence of an irregularity in any campaign should not be attributed to a particular candidate where he did not participate therein. The House agreed to a resolution that Mr. Alford was entitled to his seat.

Alleged Error Insufficient to Change Result

§ 13.3 Where more ballots were cast than there were names listed on the polls, an elections committee may still recommend dismissal of the contest if the errors were inadvertent and insufficient to change the result even if all the excess ballots were added to the contestant's total.

In the 1965 Iowa election contest of *Peterson v Gross* (§61.3, *infra*), the election committee found that although there may have been human errors committed at the polls on election day there was no evidence of fraud or

willful misconduct. In regard to a specific allegation by the contestant that more ballots were cast than names listed on the polls, the committee concluded that some inadvertent errors had been made but the errors were insufficient to change the result even if all the excess ballots were added to the total of the contestant.

Failure to Exhaust State Remedy

§ 13.4 In rejecting contestant's demand for a recount of a vote by the House, an elections committee may take into consideration contestant's failure to exhaust his remedy of obtaining a recount through a state court.

In *Swanson v Harrington* (§50.4, *infra*), a 1940 Iowa contest, contestant claimed that the House should require a recount, citing an informal recount he had taken in connection with an election involving a local sheriff's office. The committee found that contestant had not exhausted his remedy of obtaining a recount through the state courts, as permitted by the Iowa code, and rejected his argument that he had been precluded from invoking state court aid inasmuch as the state courts had not construed the relevant state election law as it

applied to a seat in the House. [Compare §5.13, *supra*.]

§ 13.5 Where the contestee did not participate in widespread violations of state laws governing absentee voting, which violations had been committed by election officials, and contestant had not exhausted his state remedies to prevent improper absentee ballots from being cast or to punish those responsible, the election committee would not overturn the results of the election.

In the 1957 Iowa election contest of *Carter v LeCompte* (§57.1, *infra*), the committee majority found violations of state laws governing absentee ballots committed by officials throughout the district, but determined that the contestant had not proven fraud by the contestee and had not challenged absentee ballots under state law, with the result that he had not sustained his burden of proving that the election results would have been different. The minority on the committee cited the contest of *Steel v Scott* (6 Cannon's Precedents §146), for the proposition that total disregard of election laws by election officials, though in the absence of fraud, was sufficient basis for a

recount, which in this contest would have shown contestant Carter the winner by 1,260 votes.

Pre-election Irregularity

§ 13.6 Results of an election will not be overturned on the basis of a pre-election irregularity, where the contestant could have made timely objection thereto, under state law, but failed to do so.

In the 1957 Iowa election contest of *Carter v LeCompte* (§57.1, *infra*), the election committee majority found that there were violations of state laws governing absentee voting committed by election officials throughout the district, although the contestee had not personally participated in these violations. The majority determined that the contestant had not shown that he had exhausted his state remedies to prevent improper absentee ballots from being cast or to punish those responsible. Citing *Huber v Ayres* (§56.1, *infra*), a 1951 Ohio contest, the majority determined also that the contestant had not properly entered his objections to errors as to the form of the absentee ballots prior to the election, as permitted by Iowa law, and that therefore the results of the election could not be “overturned because of some pre-election irregularity.”

§ 13.7 Where contestant had not properly entered objections to errors in the form of the absentee ballot prior to the election, as permitted by state law, the results of the election could not be “overturned because of some preelection irregularity” (see § 13.6, *supra*).

Failure to Specify Grounds Relied Upon by Contestant

§ 13.8 The contestant must specify particularly the grounds upon which he relies in an election contest.

In *Roberts v Douglas* (§54.4, *infra*), a 1947 California contest, contestee Helen Gahagan Douglas moved to dismiss on the grounds (1) that the contestant had not instituted a valid contest, as the statute then in force (2 USC §201) and House precedents required him to specify the grounds upon which he relied in the contest and (2) contestant had taken no testimony within the 90 days permitted to support his notice of contest. By voice vote, the House resolved that the contest be dismissed and the contestee take her seat.